MALAYSIA BUILDING SOCIETY BHD

v.

UNIVEIN SDN BHD (NO 2)

HIGH COURT MALAYA, SHAH ALAM
SURIYADI HALIM OMAR J
[ORIGINATING SUMMONS NO: MT4-24-808-1997]
11 MARCH 2003

EVIDENCE: *Judicial Notice - "Geographical divisions of the World" - Whether application to invoke judicial notice thereof misconceived - Whether Evidence Act applicable - Judicial proceedings - Evidence Act 1950, ss. 2, 36, 56, 57, 83*

CIVIL PROCEDURE: *Appeal - Adducing fresh evidence - Appeal to Judge in Chambers - Whether a rehearing - Whether could re-open case - Rules of the High Court 1980 O. 56 r. 1(3A)*

The defendant had appealed against the order of the learned deputy registrar, pursuant to the plaintiff's summons for direction, ordering that the gross reserve price for the three pieces of land belonging to the defendant be fixed at RM27,680,000. In essence, the defendant's complaint was that the photostated map supporting the affidavit, which in turn supported the summons for direction, was incomplete. Before the learned judge, the plaintiff prayed the court to invoke the provisions of ss. 56 and 57 of the Evidence Act 1950 ('the Act'). In retort, the defendant raised two preliminary objections namely: (i) that the plaintiff should not be allowed to produce the map from the bar table; and (ii) the application was misconceived pursuant to s. 2 of the Act.

Held (dismissing the appeal and affirming the deputy registrar):

[1] As the instant case is an appeal to the judge in chambers, it is a rehearing, and thus, parties are permitted to re-open their case and canvass new issues, if the need arises. Moreover, it was not a question of the introduction of fresh evidence, eg, under O. 56 r. 1(3A) of the Rules of the High Court, but an exercise to obtain clarification from the larger and original copy. No one would be prejudiced by the court's desire to go to the bottom of the matter in the circumstances of the case. (p 355 f-g)

[2] The invocation of ss. 56 and 57 of the Act was pursuant to judicial proceedings and thus would have fallen squarely under the first part of s. 2 of the Act. (p 356 h-i)

[3] The matter came within the ambit of s. 57(1)(j) read together with ss. 56, 83 and 36 of the Act. This apart, s. 57(1)(j) of the Act should not be restricted merely to cross border geographical divisions, meaning international division, but must include the internal geographical divisions. (p 357 a-b & f-g)

Case(s) referred to:

Bank Kerjasama Rakyat Malaysia v. Daya Plaza Sdn Bhd; Empire Possession Sdn Bhd (Intervener) [1998] 5 CLJ 79 HC ***(refd)***

Dato' Mohamed Hashim Shamsuddin v. Attorney-General, Hong Kong [1986] 2 MLJ 112 ***(refd)***

Eight Development (M) Sdn Bhd v. Antara Steel Mills Sdn Bhd, Guaman No. 22-390-96 (Unreported) ***(dist)***

Eu Finance Bhd lwn. Sim Sen Organization Bhd [1990] 2 MLJ 357 ***(dist)***

Malayan United Finance Bhd v. Adsoni (M) Bhd [1990] 2 CLJ 254; [1990] 2 CLJ (Rep) 435 HC ***(refd)***

Ng Hee Thoong & Anor v. Public Bank [1995] 1 CLJ 609 CA ***(refd)***

Pembangunan Maha Murni Sdn Bhd v. Jururus Ladang Sdn Bhd [1986] 2 MLJ 30 ***(refd)***

PP v. Chu Beow Hin [1982] 1 MLJ 135 ***(refd)***

PP v. Saad Mat Takraw & Anor [1998] 3 CLJ 380 HC ***(refd)***

Re Ong Thim Kuang, Ex p Public bank Bhd And Other Cases [2000] 2 CLJ 529 HC ***(dist)***

Re Sama Corporation Sdn Bhd; CI Holding Bhd v. Jabatan Pemegang Harta [1992] 2 MLJ 251 HC ***(dist)***

Legislation referred to:

Evidence Act 1950, ss. 36, 56, 57(1)(a)-(o), (3), 63, 83

Rules of the High Court 1980, O. 56 r. 1(3A)

Other source(s) referred to:

Sarkar's Law of Evidence, p. 705

For the plaintiff - Wong Kian Kheong; M/s Lee Hishamuddin

For the defendant - KL Pang; M/s Cheah Teh & Su

Reported by Izzaty Izzuddin

JUDGMENT

Suriyadi Halim Omar J:

Pursuant to a summons for direction hearing, the Deputy Registrar on 7 November 2002 had fixed the gross reserved price at RM27,680,000 for the sale of three pieces of land, which were earlier subject to a High Court order of foreclosure. It was apparent to all and sundry that the summons for direction had a supporting affidavit, which contained a valuation report whilst the defendant had filed no affidavit in reply. With no affidavit in reply forthcoming the latter's position outwardly appeared precarious.

Even though acknowledging that this was a hearing by affidavit counsel for the defendant still requested for permission to be heard, which request was obliged by the Deputy Registrar. After a brave attempt by the defendant, and inspite of the ventilation of his views, the Deputy Registrar had meted out the current order, to be promptly followed by the defendant's notice of appeal.

Although I had stressed the necessity of evidence being given on oath, as it is a principle fundamental to Malaysia's adversarial system, the defendant's counsel before me in this appeal had strenuously applied to express his views again from the bar table, founded on the reason of there being certain fundamental infirmities apparent on the valuation report (*Ng Hee Thoong & Anor v. Public Bank* [1995] 1 CLJ 609 CA). Much as I abhorred the idea of ignoring the basic tenets of the law of evidence, especially when there was an uncontradicted position taken in the report by the valuer of the plaintiff, due to its intrinsic dissatisfactory reporting, I permitted him to continue (see *Re Sama Corporation Sdn Bhd; CI Holding Bhd v. Jabatan Pemegang Harta* [1992] 2 MLJ 251). I could not don on blinkers in the circumstances of the case, to borrow the phrase of the defendant's counsel, and ignore the obvious that two plus two could not be six. With advancing the course of justice in mind, I permitted him to assist the court.

The market value of the subject properties, free from all encumbrances, was opined by the plaintiff's valuer ie, CH Williams Talhar & Wong to have a market value of RM27,680,000. As said earlier, with such a positive assertion, and without the availability of any contradictory valuation report, in the normal course of events without more I would not have hesitated to dismiss the appeal with costs. It is a well settled principle that where a party makes a positive assertion, and there is failure on the part of the opponent to dispute or contradict that assertion, the latter is deemed to admit the fact so asserted (*Overseas Investment Pte Ltd v. Anthony William O'brien* [1988] 3 MLJ 332). Unfortunately the matter before me was not as straightforward as I thought.

The subject lands here were identifiable as lots 147, 167, and 210 with their locations in section 63. A cursory perusal of the valuation report showed that the comparables were lots 777, 778, 924, 926, 163, all being in s. 57. Yet it was quite clear, even during the brief exchanges between the court and the parties that the plaintiff's valuer had failed to indicate the whereabouts of the location of the comparables in relation to the subject properties, in the photostated map supplied in the valuation report. In a gist the defendant had submitted that, with the valuation report peppered with loopholes, the value given to the subject properties were unsubstantiated and thus unsafe to be accepted. To substantiate its stance the defendant adverted to a few cases in the like of *Eu Finance Bhd lwn. Sim Sen Organization Bhd* [1990] 2 MLJ 357; *Re Sama Corporation Sdn Bhd; CI Holding Bhd v. Jabatan Pemegang Harta (supra)*; *Eight Development (M) Sdn Bhd v. Antara Steel Mills Sdn Bhd* (Guaman No. 22-390-96).

Touching on the three cases supplied above, I had no difficulty in rejecting them, as they were distinguishable, irrelevant and perhaps prejudicial to the defendant's case. I begin off with the case of *Eight Development (M) Sdn Bhd v. Antara Steel Mills Sdn Bhd* where despite the availability of a rebuttal valuation report supplied by the defendant, the court still rejected it. To the presiding judge, it was quite obvious that the rebuttal report was at best weak, as the information considered by the valuer was hearsay based. Surely, if the availability of a rebuttal valuation report could not save the day for the defendant, the lack of it would definitely make the defendant's case unbearable. As regards the other two cases, namely, *Eu Finance Bhd lwn. Sim Sen Organization Bhd and Re Sama Corporation Sdn Bhd; CI Holding Bhd v. Jabatan Pemegang Harta* it was quite obvious in the first case, that the defendant had submitted an application to set aside the sale order, and was strongly backed by a valuation report (TKC 15). The plaintiff's report on the other hand was unreliable and tainted, as it was a desk valuation, without the maker surveying the impugned land. The second case was just as bad, as not only did the plaintiff's valuation reports not indicate any evidence of values of comparative properties, but also had not even been signed by the maker. The applicants/appellants who were the creditors, and who had objected to the courts' order, on the other hand did not make things easy for the respondent, as they had filed their affidavit in replies, with the necessary rebuttal reports enclosed and which averments were not disputed. On that score how could Zakaria Yatim J (as His Lordship then was), not conclude that the earlier court order was not founded on a proper valuation report, a report which in the process was vitiated by other reliable valuation reports. Based on the rationale stated above the cases supplied by the defendant were inapplicable and in fact had militate against the interest of the latter.

I now return to the main case. Undeterred, the plaintiff's counsel when questioned about the inadequacy of the photostated map, had countered by revealing that it was in possession of the original government issued map, from which the photostated copy was duplicated, and which could assist the court in resolving the matter once and for all. Unfortunately he was faced with the monumental task of producing it as there were many procedural obstacles facing him. I was not unaware that that photostated map in the valuation report had been miniaturized from the main map, which I suspected by inadvertence, had missed out the relevant legends of "section 57" and "section 63". From that photostated copy I could pinpoint section 43, the location of KLCC and even the subject properties, but regretfully not the comparables. Perhaps realizing the unintended error, counsel for the plaintiff had prayed that I invoke the provisions of s. 56 and s. 57 of the Evidence Act 1950, which permitted me to take judicial notice of certain facts. Once I had decided to do so then no facts of which I had decided to take notice of was required to be proved (s. 56). The relevant question that could not be avoided and which will be answered later (after having resolved the other preliminary objections), was if I were to acquiesce to that application, under which illustration of s. 57(1) from (a) to (o) of the Act should it be?

The first preliminary objection pertaining to this application, was the vehement objection of the defendant of the plaintiff's attempt to produce the map from the bar table. My comment was that sauce for the goose, was also sauce for the gender. Why complain about another when one was similarly not blameless? The fact that the application was at the appeal stage was of no help to the plaintiff either, so said the defendant. I brushed aside that view too, as an appeal to a judge in chambers was a rehearing, with both parties permitted to reopen its case and to canvass new issues, if the need arises. It was also not a question of the introduction of fresh evidence, say under O. 56 r. 1(3A) of the Rules of the High Court 1980 (PU(A) 50/1980, but an exercise to obtain clarification from the larger and original copy. In all certainty no one would be prejudiced by the court's desire to go to the bottom of the matter in the circumstances of the case.

The other objection was that due to the inhibitive provision of s. 2, the application was misconceived, as it was legally not permitted. This section reads:

> This Act shall apply to all judicial proceedings in or before any court, but not to affidavits presented to any court or officer nor to proceedings before an arbitrator.

Returning to the facts, it was indisputable that the impugned unsatisfactory photostated copy of the map, meant to support the summons for direction, was indeed exhibited in the affidavit. By virtue of that nexus, the defendant had argued that any production of the original to overcome that flaw ie, by invoking the 'judicial notice" provision, was not permissible.

The case of *Re Ong Thim Kuang, Ex p Public bank Bhd And Other Cases* [2000] 2 CLJ 529 was brought to my attention, to deny the plaintiff's application. The facts of the latter case were clearly distinguishable to the current matrix of the case, as the matter there pertained to the inapplicability of the Evidence Act in relation to the affidavit under scrutiny. Historically speaking, prior to 1849 no punctuation normally appeared in the Acts on the Rolls of Parliament in England, with its insertion thereafter becoming the norm. Just as a court must give effect to the clear and explicit language of any enacted words, in any statute, likewise there is no legal premise why punctuations though a minor element in the construction of a statute, used to separate sentences and phrases etc. and to clarify their meanings should be brushed aside (*PP v. Chu Beow Hin* [1982] 1 MLJ 135). It has a purpose and some consideration must be given to it. Abdoolcader SCJ in *Dato' Mohamed Hashim Shamsuddin v. Attorney-General, Hong Kong* [1986] 2 MLJ 112 had the opportunity to remark:

> In answer to me as to the significance of the comma after the words "letter of request" in paragraph (1) of section 16 he says it does not in any way affect the position. I wholly reject this contention. Its punctuation forms part of any statutory enactment and may be used as a guide to interpretation. **The day is long past when the courts would pay no heed to punctuation in any written law and the presence or absence of a comma may be highly significant** (emphasis added).

A microscopic perusal of s. 2 will highlight that there are two parts to that provision, due to the promulgation of the punctuation mark (",") after " in or before any court,". In no uncertain terms could I ignore that punctuation, in this case that comma, as it was abundantly clear that it had a role to play in that piece of legislation. It thus follow that by that disjunctive comma, the Evidence Act 1950 would be applicable " to all judicial proceedings in or before any court, with the hearing before me certainly qualifying as one. Its inapplicability will be triggered the moment the invocation of the Act is intended to fall under the second part ie, "to affidavits, presented to any court or officer nor to proceedings before an arbitrator". Invariably if I were to invoke ss. 56 and 57 with that intention in mind, then the defendant's argument would have some merit. As it were, I was satisfied that the invocation of the latter two provisions were pursuant to a judicial proceedings, and thus would have fallen

squarely under the first part of s. 2. With all the preliminary issues resolved I had thereafter accordingly invoked the 'judicial notice' provisions.

So, under which illustration of s. 57 should the matter under discussion be? After having considered the law and the evidence, I was satisfied that the matter came within the four corners of s. 57(1)(j) read together with ss. 56, 83 and 36. Section 57(1)j provides:

> (1) Facts of which court must take judicial notice of the following facts:
>
> (a)
>
> (b)
>
> (j) the ordinary course of nature, natural and artificial divisions of time, **the geographical divisions of the world** ... . (emphasis added).

To sidetrack a little, on the issue of selecting the correct illustration, it is quite settled that the list in s. 57 is not exhaustive, due to the difficulties of providing a comprehensive one. The changes of time have not made things easier either. Syed Agil Barakhbah SCJ in *Pembangunan Maha Murni Sdn Bhd v. Jururus Ladang Sdn Bhd* [1986] 2 MLJ 30 had occasion to opine:

> In so far as judicial notice is concerned, the provisions of section 57 **subsection (1) makes it mandatory** to take judicial notice of matters enumerated in subsection (1) (a) to (o) of the section. **The list however is not exhaustive since it is impossible to make a really complete list** ... . The important point to note is that section 57 does not prohibit the courts from taking judicial notice of other facts not mentioned therein (emphasis added).

Returning to the mainstream ie, as to the interpretation of s. 57(1)(j), an intense scrutiny of the phrase "the geographical divisions of the world", persuaded me to construct that it should not be restricted merely to cross border geographical divisions, meaning international divisions.

There is no legal logic why the terminology "the world" cannot include the internal geographical divisions. Nothing has been legislated into it to indicate that internal geographical divisions are too frivolous, puny or unworthy to be grouped along with international geographical divisions. If Malaysia or any small parts of Malaysia is an integral part of the world, why deny it its rightful place in this globe? Returning to the matter at hand, I only wanted to know the positions of sections 67 and 57 *vis-a-vis* the comparables, in relation to their geographical divisions only, and not the precise distance between them. Had I desired the latter, I would certainly have surrendered to the flack (*Public Prosecutor v. Saad Mat Takraw & Anor* [1998] 3 CLJ 380 HC).

Certainly a government issued map would have resolved the above query once and for all. How could it not be so, as under s. 83 the court shall presume that maps or plans purporting to be made by the authority of the Government of Malaysia or the Government of any State, was so made and accurate. A cursory look of 1/d1 (the original map), indicated that it had been endorsed by the Jabatan Ukur Wilayah Persekutuan, carrying with it the reference number of Bil. 135/2522. The defendant on its originality and authenticity took up no objection.

For purposes of my quest, which entailed my detailed scrutiny of the original map, s. 36 of the Evidence Act was highly pertinent. Under the latter provision, statement of facts in issue or relevant facts made in published maps or charts generally offered for public sale, or in maps or plans made under the authority of the Government of Malaysia or of any State as to matters usually represented or stated in such maps, charts or plans, are themselves relevant facts.

Sarkar's Law of Evidence at p. 705 had authored that the words "statements of facts" in the beginning of the section evidently mean statements of general geographical facts, eg, physical features, boundaries, situation, relative position, of countries, districts, towns, villages, topographical description, distance, etc. usually stated in maps." Therefore, indications or entries of the legends "section 57" and "section 63" or their whereabouts in the original map if any, would be incontrovertibly relevant.

Having dealt with the preliminary matters, I had requested for the production (as opposed to tendering) of the government issued map by the plaintiff's counsel pursuant to s. 57(3) of the Evidence Act, which for convenience and as a point of reference had been referred to as i/d 1. A scrutiny of the map enlightened me beyond doubt that sections 57 and 63 were practically neighbours, and were located at the fringes of the world famous Kuala Lumpur City Centre area, though at opposite ends. With that information elicited from the map, I was satisfied that the comparables were evidently reasonable comparables, inter alia, they were of about the same sizes, located in the same vicinity, transacted rather recently, and with sale values that were not too excessive or low in comparison with the projected price of the subject properties. No criticism also could be leveled against the valuation report on the method applied, as the comparison method had been alluded to (*Eu Finance Bhd lwn. Sim Sen Organization Bhd (supra)*.

That being so, I had concluded that the infirmities detected in the valuation report had been overcome, paving the way for me to safely use the recommendations of the report. Having sieved the one-sided report, as there

was no rebuttal evidence submitted by the defendant, the passage was smooth sailing for me to affirm the order of the Deputy Registrar, (*Malayan United Finance Bhd v. Adsoni (M) Bhd* [1990] 2 CLJ 254; [1990] 2 CLJ (Rep) 435; *Bank Kerjasama Rakyat Malaysia v. Daya Plaza Sdn Bhd; Empire Possession Sdn Bhd (Intervener)* [1998] 5 CLJ 79). On that note I had dismissed the appeal with costs.